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IN THE

SUPREME COURT OF THE UNITED STATES

..... TERM, 1971

No. 71-75

DONALD P. SMALLWOOD and ROY E. LAY,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

DANIEL V. O'BRIEN
Attorney for Donald P. Smallwood, Petitioner

STEPHEN H. GILMORE
1250 Big Bend Boulevard
St. Louis, Missouri 63117
644-3366
Attorney for Roy E. Lay, Petitioner

St. Louis Law Printing Co., Inc., 411-15 N. Eighth St. 63101 314-231-4477

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Petitioners Donald P. Smallwood and Roy E. Lay pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above entitled cause on June 14, 1971.

OPINION BELOW

The opinion of the Court of Appeals for the Eighth Circuit is not yet reported and is printed in the appendix hereto (p. A-1).

JURISDICTION

The judgment of the Court of Appeals was entered on June 14, 1971 (Appendix p. A-18). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254.

QUESTIONS PRESENTED

I

Whether Petitioners as officers of the corporation have standing under the Fourth Amendment and under the Fifth Amendment of the Constitution of the United States as to documentary evidence obtained by a court appointed receiver for the corporation from which other documentary evidence was interpreted to be corporate records, such documentary evidence being obtained from the following sources:

A. Records obtained by the court appointed receiver from the attorney for the corporation, interpreted by the attorney for the corporation as being corporate and by the petitioners as personal or private, said records being relinquished by the corporate attorney when petitioners were not present and subsequently subpoenaed from the receiver by the grand jury which returned the indictment against petitioners.

B. Records obtained by the Court appointed receiver from the Office of petitioner-corporation President Donald P. Smallwood without his presence which subsequently were subpoenaed by the Grand Jury which returned the indictment against the petitioners.

II

Whether the admission or an expert testimony as to the "loss" sustained by a Corporation in the operation of its

business bottomed on facts admittedly inaccurate and inconsistent and assuming facts never proved was in effect prejudicial error.

STATEMENT

Petitioners adopt in its entirety the statement of facts set forth in the opinion below (Appendix pp. A-2, 3), with the following additions.

A court appointed receiver for the corporation admittedly never saw appellants at either the office of the corporation when records were taken from the office of the president nor were the petitioners present when records were relinquished by the corporation attorney to the receiver. These records were made into files for the personal use of receiver and were subsequently taken before the grand jury by the receiver when directed to do so by a grand jury subpoena duces tecum.

The statement by the certified public accountant was given as to the "loss sustained" by the company from documentary evidence admittedly inaccurate and conflicting, and was in response to a question assuming facts not in evidence, namely that such an answer could be given without there being a physical inventory of company assets.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted on the first question presented to resolve whether a corporation attorney could waive the rights guaranteed petitioners under the Fifth Amendment to the Constitution and the United States District Court order reaffirming their rights when the receiver was appointed. In effect a civil suit was commenced appointing the receiver. There then was the relinquish-

ment of corporate records interpreted by the corporate attorney and the receiver as being corporate as opposed to the records being personal or private in nature. When the records were so turned over to the receiver by the attorney, petitioners were not present. The question presented to the Court of Appeals was whether corporation attorneys could waive the rights of petitioners under the Fourth and Fifth Amendments to the Constitution by relinquishing such records to the court appointed receiver who subsequently took them before the Grand Jury.

Though the Eighth Circuit Court of Appeals alludes to this question, it indicates there is no reason to discuss petitioner's contention on the grounds that it was necessarily dependent upon their standing to object to the seizure of corporate records (App. p. 9). In effect the court found there was no standing and therefore, no objection on this point could be made.

A search of the cases reveals no decision on point made by this Honorable Court. However, in United States v. Hopps, 215 F. Supp. 734, an analogous situation was present where the defendant agreed to give the State Commissioner of Insurance full access to the records of the company involved. The government's position was that any and all files obtained from the company were with the consent of an attorney. The Court held that though an attorney consented to the taking, that the attorney could not consent to the taking of purely personal papers. As pointed out in the Appendix to the brief of the petitioners in the Eighth Circuit Court of Appeals, upon looking at these particular records in question, none of them reflected anything concerning records of a purely corporate nature.

United States v. Birrell, 243 F. Sup. 36, involved the surrendering of records by an attorney pursuant to a

search warrant and impounding order. The Court held that this did not amount to a consent or to a waiver of violation of defendant's rights and that the defendant had standing to invoke a motion to suppress. The search warrant was served on the attorney as the custodian of records and the court held that it was not a voluntary surrender of property but rather a submission to the force of a search warrant with respect to the process of law. In the instant case, though there was not a search warrant there was a subpoena duces tecum of the Grand Jury directed to the receiver who obtained the records in question from the corporate attorney without the petitioners being present and for all practical purposes such action did not amount to a voluntary surrender of property but rather a submission to the force of a grand jury subpoena.

The records obtained from the office of the corporation president, petitioner Donald P. Smallwood, by the Court appointed receiver and then subpoenaed by the Grand Jury was contrary to this court's decision in **Mancusi v. DeForte, 392 U.S. 364 (1968)**. The receiver indicated that when he entered the office of Smallwood, he saw records appearing to be personal, corporate, and others that he could not determine as being one or the other. These records were present on the premises of the corporation when government agents as well as the receiver had access to them. These records and those obtained from the corporate attorney mentioned supra, were then placed into respective files for the receiver who then brought them before the Grand Jury when subpoenaed. No inventory of the records was made to determine their origin as being from the company or the company's lawyer's office. The opinion of the Eighth Circuit Court of Appeals held that the receiver had lawful custody of the records and that the petitioners did not have a right to

be present either when the records were turned over to the receiver or to the Grand Jury no matter what their origin (App. p. 7). The court makes a distinction as to corporate records in the instant case as opposed to union records in Mancusi, supra. The court of appeals indicated that this Court, in Mancusi, records were taken from an area where one had reasonable expectation from governmental intrusion. It then distinguishes the instant case from Mancusi, in that as here the court appointed receiver it was necessary to conserve the assets of the corporation to protect its investors and that the receiver is not an agent or employee of either party to the litigation.

However, petitioner's position is that this is a more subtle intrusion than in Mancusi, but still an intrusion in the spirit of the decision. The records were admittedly taken without the presence of petitioners. There was no question that government agents had a right to review the records where petitioners did not. After a review by the government agents, the subpoena was issued and the receiver brought records that he thought were those of a corporate nature before the Grand Jury. All of this transpired even though the United States District Court outlined that none of the rights, privileges or immunities the petitioner may invoke before any Court as to documents or papers shall constitute a waiver, all stated at the same time the receiver was appointed.

The petitioners contend that though the court appointed receiver is bestowed with certain powers, there was still an intrusion of an area by the receiver who admitted that agents of the government were on the premises reviving the records and hence such conduct is in violation of the decision in Mancusi v. DeForte, supra.

Certiorari should be granted on the second question presented as to the testimony of the Certified Public Account-

ant who testified as to summary-chart type exhibit on which there reflected the term "loss". Though in effect the figure given for such "loss" was not in response to a hypothetical question, there was an admission by the expert witness-accountant in conflict with other individuals who prepared preceding records to obtain such a figure as to accuracy and method of preparation. He was asked specifically if he could say with accuracy that there was a "loss" to which he stated he could not since a physical inventory had not been taken and that he could not with surety say what the physical inventory would be, and furthermore without a physical inventory could not state with accuracy that a "loss" occurred.

The Eighth Circuit Court of Appeals merely alluded to the fact that a trial judge is given wide discretion in the admission of summaries of voluminous or complete business records. The appellate court at no time referred to their decision of **Kirsh v. United States, 174 F2 595**, wherein they decided there could not be an unqualified assumption of facts as true which were known to be false. The Court further held **in Kirsh**, *supra*, that it would always be necessary that the facts and circumstances put into the evidence by the Government justify by reasonable inference the truth of assumed fact.

Petitioners contend that there was admitted discrepancies and inaccuracies as to the preparation of the records used as a basis for the accountant-expert's testimony. This coupled with the fact that no physical inventory had ever occurred allowed the admission of an entry "loss" on a diagram or summary which in effect the said witness stated he could say with accuracy actually existed, constituted prejudicial error.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of Certiorari should be granted.

Respectfully submitted

DANIEL V. O'BRIEN
Attorney for Donald P. Smallwood,
Petitioner

STEPHEN H. GILMORE
1250 Big Bend Boulevard
St. Louis, Missouri 63117
644-3366
Attorney for Roy E. Lay,
Petitioner